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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-199

MORTGAGE GROWTH INVESTORS,
a Massachusetts business trust,
Appellant,

vs.

CLOW CORPORATION, a Delaware corporation, et al.,
Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

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JURISDICTIONAL STATEMENT ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Appellant appeals from the decision of a specially constituted United States District Court of three judges for the Eastern District of Michigan, filed with the Clerk of the Court on December 20, 1977, entered as a final judgment on February 17, 1978, and a rehearing denied on April 20, 1978.

JURISDICTION

This action was initiated by appellant and pursuant to 28 USC §§ 1331, 1343, 2201 and 2202. A court comprised of three judges was constituted to hear this cause in the court

below as provided by 28 USC §2284. On December 20, 1977, the court filed its opinion denying appellant's prayer that the Mechanic's Lien Act of the State of Michigan be held unconstitutional and that enforcement of that statute be enjoined. The opinion and judgment of the court was entered as a final judgment on February 17, 1978. A petition for a rehearing was denied on April 20, 1978. The opinion, judgment, opinion denying rehearing and order denying rehearing are attached hereto as Appendix A.[1] A notice of appeal to this Court was filed in the United States District Court for the Eastern District of Michigan on June 8, 1978, and a copy of that notice of appeal is attached hereto as Appendix B.

This is a direct appeal from the judgment of a three judge District Court denying, after hearing, the request of an injunction against enforcement of State statutes, a matter required by Title 28 USC §2281 and §2284 to be heard by a three judge court at the time these proceedings were commenced. This Court has jurisdiction to consider this appeal under Title 28 USC §1253. *Florida Lime & Avocado Growers, Inc.* v *Jacobsen*, 362 US 73, 80 S Ct 568, 4 L Ed 2d 568 (1960).

STATUTES INVOLVED

The Michigan Statutes provide for a lien against real estate for labor and materials claimed to have been supplied for the improvement of land. A lien against the property in any amount the claimant alleges is accomplished by the perfunctory record of a Statement of Account and Lien with the Register of Deeds for the county in which the land is located. A lien filed has priority over all other liens and encumbrances, which priority relates back to the first preliminary planning work. The statute does not provide for any due process notice or hearing to determine even a probable validity of the claim, for any form of State or judicial control over the recorded lien, nor for any security to protect the property owner against damage from a wrongfully or capriciously filed lien; *rather*, to remove a lien, a property owner must post a *penal* bond in *twice* the amount of the lien. The statute as interpreted by the Michigan Supreme Court requires only substantial compliance with the procedural requirements for perfection of a lien.

The state statute involved is extensive, and a copy is attached hereto as Appendix C. The statute is found in MCLA 570.1, et seq.

[1] Copies of the United States District Court's original Opinion, Final Judgment, Opinion Denying Rehearing and Order Denying Rehearing are attached as Appendix A. The Opinion and Judgment have not yet appeared in Federal Supplement.

QUESTIONS PRESENTED

A. Was the jurisdictional statement utilized by the United States Supreme Court in the summary affirmance in *Spielman-Fond* v. *Hanson's, Inc.*, 379 F Supp 997 (D AZ 1972), aff'd per curiam 417 US 901 (1974) broader than the actual decision of the United States District Court thus making summary affirmance in *Spielman-Fond* v *Hanson's, Inc.* inapplicable as a binding precedent in the case at bar.

B. Did the United States District Court commit error in upholding the constitutionality of the Michigan Mechanic's Lien Act on the basis of the decisions of the United States Supreme Court in *Spielman-Fond* v *Hanson's, Inc.*, 379 F Supp 997 (D AZ 1972), aff'd per curiam 417 US 901 (1974); *Hicks* v *Miranda*, 422 US 332, 95 S Ct 2281,

45 L Ed 2d 223 (1975); and *Mandel* v *Bradley*, ... US ....., 97 S Ct 2238, ... L Ed 2d ..... (1977) and by erroneously finding no significant factual difference between the Michigan and Arizona Statutes, nor superceding doctrinal developments.

STATEMENT OF THE CASE

Appellant is the owner of an apartment project located in Macomb County, Michigan. The apartment project was developed by Metro Villa Apartments, a Michigan Co-Partnership, under a lease arrangement with the owners, Mortgage Growth Investors. Metro Villa Apartments subsequently defaulted under the lease leaving Mortgage Growth Investors as sole owner of the land and appurtenances. Mechanic's liens of approximately $750,000 have been filed against the property by the appellees in this case causing a shutdown of the project prior to the owner having an opportunity to contest the underlying validity of the lien claims. To remove the encumbrance on his title, the owner must in this case post a penal bond in the sum of approximately 1.5 million dollars.

This action was instituted to determine whether the mechanic's liens can be maintained against the title to the appellant's property or whether enforcement of the state statutes regarding those liens should be enjoined as being in conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States. Necessarily, the action required an adjudication of the validity of the Michigan statutes which allow mechanic's liens to be recorded ex parte as a cloud on the title, and an encumbrance against an *alleged* debtor's property. The District Court declined to consider the constitutionality of the Michigan statute on the merits, being of the opinion they were bound by the precedential value of the summary affirm-

ance of this court in *Spielman-Fond, Inc.* v *Hanson's, Inc.*, 379 F Supp 997 (D AZ 1972), aff'd per curiam 417 US 901 (1974) of a decision of a District Court in Arizona upholding the constitutionality of the Arizona Mechanic's Lien Statute.

THE QUESTIONS ARE SUBSTANTIAL

The questions before the Court in this appeal are substantial in that they deal with the broad scope of recent decision of this Court concerning the precedential weight of a summary affirmance of this Court. *Fusari* v *Steinberg*, 419 US 379 (1975); *Hicks* v *Miranda*, 422 US 332 (1975); *Mandel* v *Bradley*, 432 US 173 (1977) and more specifically the binding effect of a summary affirmance of a decision upholding an Arizona statute on a United States District Court considering the constitutionality of a Michigan statute with the same general purpose but with significant differences.

Second, the questions before this Court deal with the scope of recent decisions of this Court dealing with due process standards for prejudgment remedies; *Sniadach* v *Family Finance Corp.*, 395 US 337, 89 S Ct 1820, 23 L Ed 2d 349 (1969); *Fuentes* v *Shevin*, 407 US 67, 92 S Ct 1983, 32 L Ed 2d 556 (1972); *North Georgia Finishing, Inc.* v *Di-Chem, Inc.*, 419 US 601, 95 S Ct 719, 42 L Ed 2d 751 (1975); and whether the due process standards set forth in these cases are to be selectively applied only to deprivation of a possessory interest in property or broadly applied to all prejudgment remedies including those which encumber title to real property such as mechanic's liens and prejudgment attachment of property.

Third, there exists an absolute and direct conflict between different Districts of the United States District Courts. Subsequent to the summary affirmance by this

Court of the decision in *Spielman-Fond*, the following United States District Court decisions have determined that said summary affirmance is binding precedent for the proposition that a nonpossessory deprivation of property does not constitute a deprivation of a significant property interest for purposes of applying Fourteenth Amendment due process standards and consequently declined to review mechanic's lien or prejudgment attachment statutes on their merits.

Matter of Northwest Homes of Chehalis, Inc., 526 F2d 505 (1975)

B & P Development v *Walker*, 420 F Supp 704 (WD PA 1976)

In Re Thomas Cary, 412 F Supp 667 (D VA 1976)

The following United States District Courts have found the summary affirmance of *Spielman-Fond* not to be a binding precedent for the proposition that nonpossessory interests in real property are not protected by Fourteenth Amendment due process standards and have examined such statutes on their merits.

Hutchinson v *Bank of North Carolina*, 392 F Supp 888 (MD NC 1975)

Terranova v *Avco Financial Services of Barre, Inc.*, 396 F Supp 1402 (D VT 1975)

United States General, Inc. v *Arndt*, 417 F Supp 1300 (ED WI 1976)

Appellant submits that the United States District Court erred in this case in finding the Arizona *Spielman-Fond* decision binding precedent. The District Court decision in *Spielman-Fond*, which was summarily affirmed by this Court, *does not hold that* mechanic's liens are not significant property interests protected by the Fourteenth Amend-

ment Due Process Clause because they are nonpossessory; *but rather that* the Arizona statute, on balance, because of the protections offered the owner by the statute is not violative of due process. Too much emphasis has been placed on the fact that mechanic's liens are nonpossessory and not enough on the significant differences in the Arizona[2] and Michigan statutes. The Arizona statute requires foreclosure on the mechanic's lien within six months. The Michigan statute only requires foreclosure to be commenced within a year and a hearing is not necessarily held for an extended period after that date. The Arizona statute allows owners of property to prevent liens on that property by requiring a performance bond of the contractor. The Michigan statute offers an owner no such protection. To bond off a lien in Michigan, an owner must post a *penal* bond in twice the amount. Arizona does not require a *penal* bond to remove a lien.

Appellant further submits that the decision of this Court in *North Georgia, supra*, the most recent decision on due process standards, is the applicable precedent and represents the doctrinal development referenced in *Hicks* v *Miranda, supra*. It is by the due process standards of *North Georgia* that the Michigan Mechanic's Lien Act should be judged, than "rubber stamped" on the basis of a summary affirmance which occurred at a time when due process standards were less defined. It is the position of the appellant that this Court should eliminate the confusion in this area by making it clear that the summary affirmance in *Spielman-Fond* is not binding precedent on all District Courts to uphold all prejudgment liens on real property but that rather each statute must stand or fall on its merits when examined under the due process standards of *North Georgia*.

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[2] Arizona Revised Statutes, §§ 33-981, et seq.

The District Court in the case at bar has abdicated its proper role in the adjudication of constitutional issues by too broad an application of the precedential weight of a summary affirmance. The misapplication by the District Court of recent decisions of this Court dealing with the precedent weight of a summary affirmance to avoid the determination on the merits of a challenge by a landowner of a statute which allows his title to be encumbered by liens without notice or an opportunity to contest presents this Court with a substantial question that should be settled by a decision of this Court.

CONCLUSION

The decision below warrants summary reversal. In any event, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A

Opinion of United States District Court, Dated 12-20-77

Plaintiff, a Massachusetts Business Trust, is the fee owner and lessor of certain Michigan real estate upon which an apartment complex allegedly costing in excess of $5,000,000 was constructed. Fourteen (14) mechanic's liens covering improvements valued at $648,074.00 were filed against this property by subcontractors and materialmen who are defendants. These liens are grounded on the Michigan Mechanic's Lien Act, M.C.L.A. § 501, *et seq.*

Within one (1) year of the filing of these liens a suit to foreclose them was instituted in a Michigan state court. Plaintiff then began an action here by petition to convene a three-judge district court so that it could challenge the constitutionality of the Michigan Mechanic's Lien Act. The challenge is based on alleged violations of plaintiff's Fourteenth Amendment rights in that the Act fails to provide for meaningful notice, fails to provide for an early hearing at which the claimant has the burden of establishing the validity of his lien, allows a claimant to encumber property without sufficient procedural safeguards, and does not give persons in the position of plaintiff any reasonable procedure for removing the lien. The court was convened, and its initial action was to deny a defense motion to abstain, holding that there was no ambiguity in the statute which, if resolved by the state courts, would avoid the need to consider the federal constitutional issues. The case then proceeded to issue on stipulated facts and documents. The court has before it extensive briefs by the parties and the benefit of oral arguments.

I.

The Michigan Mechanic's Lien Act (M.C.L.A. 570.1-570.30) provides that persons who furnish labor or materials, pursuant to a contract or sub-contract to the owner or lessee of the land to build, alter, or repair improvements on the land shall have a lien on such improvements. To cause such a lien to attach the provider of labor or materials must serve the owner or lessee with written notice of the fact that he is providing benefits. This notice must be given within ninety (90) days after the first furnishing of these benefits. M.C.L.A. 570.1. To avail itself of the provisions of the statute, the provider of labor or materials must then make and record in the Office of the Register of Deeds, in the county where the real estate is located, a verified affidavit stating the amount due and a description of the property charged with the lien. The affidavit must be recorded within ninety (90) days of the completion of the work or the date of the last delivery of materials. The recording provides notice to subsequent purchasers and is substantially similar to the recording of a mortgage. M.C.-L.A. 570.5. M.C.L.A. 570.6 requires that the notice be served upon the owner or lessee of the premises subject to the lien within ten (10) days if found within the county where the premises is situated, or by posting the premises within five (5) days if he is not found in the county. This notice requirement is waived in a situation in which a contractor or sub-contractor deals directly with the owner. The owner or lessee can discharge the lien by posting a bond with two (2) or more sureties in twice the amount of the lien. The clerk must notify the lienholder within ten (10) days, and the lien holder then has ten (10) days to object to the sufficiency of the bond or the sureties. M.C.L.A. 570.7. The owner or lessee can require the lienor to furnish within five (5) days a written statement of the amount of labor or materials furnished to date and unpaid under

penalty of forfeiture of his lien. M.C.L.A. 570.8. M.C.L.A. 570.9 provides that such a lien shall continue for a period of one year after the Statement of Account and Lien are recorded and no longer unless proceedings are begun to enforce it. This section also states the priorities of the lien over other interests. The remaining sections of the statute describe the *judicial proceedings* to be used to foreclose the lien, the sale of the property pursuant to court order, and the status of competing claims.

II.

The United States Supreme Court has recently had opportunity to consider challenges to the Arizona and California Mechanics' Lien Acts. *Spielman-Fond, Inc.* v. *Hanson's, Inc.*, 379 F. Supp 997 (D. Ariz. 1972), aff'd per curiam 417 U.S. 901 (1974); *Connolly Development, Inc.* v. *Superior Court*, 132 Cal. Rptr. 477, 533 P.2d 637 (1976), appeal dismissed for want of a substantial federal question 97 S. Ct. 778 (1977). In *Hicks* v. *Miranda*, 422 U.S. 332 (1975), the Court stated that its summary dismissals or affirmances are binding as to the issues properly presented to it and declared by it to be without substance.[1] It is, therefore, incumbent on district courts to "ascertain the reach and content" of such summary dismissals. *Hicks, supra*, at n. 14. As explained in *Mandel* v. *Bradley*, 45 U.S.L.W. 4701 (June 16, 1977), *Hicks* requires us to ex-

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[1] *See generally*, Comment, The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question, 76 Colum. L. R. 508, 508 n. 1 (1976) where it is stated that the distinction between a summary affirmance of a federal court decision and the dismissal for want of a substantial federal question of a state court decision is purely historical, there being no substantive difference between these two ways of summarily disposing of appeals within the Court's obligatory jurisdiction.

amine the earlier cases, *Spielman-Fond* and *Connolly Development*, to compare and contrast the issues presented to the United States Supreme Court with the issues in the case before us. If the issues before us are the same as those the Supreme Court considered and found to be without substance, we are foreclosed from going to the merits of these issues. Only if there are material differences do we go to the merits.

We have examined the Arizona and California Mechanics' Lien Acts and compared them to the Michigan statute. We have also examined the jurisdictional statements in the *Spielman-Fond* and *Connolly Development* appeals and compared the issues presented in them with the issues presented in this case. On the basis of these careful comparisons we conclude that the issues raised in this case were presented to the United States Supreme Court and were found by it to be without substance. Therefore, we are bound to uphold the constitutionality of the Michigan Mechanics' Lien Act.

The Arizona statute upheld in *Spielman-Fond* is almost identical to the Michigan statute. The only differences are that the Arizona statute provides a six (6) month period in which the lien must be enforced or expire while the Michigan statute allows one year, and that a bond of one and one-half times the claimed amount is required in Arizona versus twice the amount claimed in Michigan. These differences are of minimal consequence in terms of due process and cannot serve to materially distinguish the statutes. The three-judge court in *Spielman-Fond* concluded that:

> The filing of a mechanics' and materialman's lien does not amount to a taking of a significant property interest, and that, accordingly, ARS §33-981, *et seq.* are not violative of due process of law under the Fourteenth Amendment for failing to provide notice and hearing prior to the filing of the lien. 379 F. Supp. at 999.

The California statutory scheme upheld in *Connolly Development* may be more onerous than that set forth in the Michigan statute. The California statutory scheme provides that if a supplier of labor or material serves a bonded stop notice on the construction project lender, the lender must withhold sufficient money to pay the stop notice claimant. Other than this there are only two minor differences: the time for giving notice that labor and materials are being provided is twenty (20) days in California and ninety (90) days in Michigan; the California lien expires unless foreclosed within ninety (90) days, while this period is one (1) year in Michigan.

The California Supreme Court went to the merits of the case, *presumably* to determine if the California scheme passed muster under the state constitution. The majority stated:

> In summary, we conclude that the recordation of a mechanics' lien, or filing of a stop notice, inflicts upon the owner only a minimal deprivation of property; that the laborer and materialman have an interest in the specific property subject to the lien since their work and materials have enhanced the value of that property; and that state policy strongly supports the preservation of laws which give the laborer and materialman security for their claims. In measuring these values, we do not deal in cold abstractions: we take into account the social effect of the liens and the interests of the workers and materialmen that the liens are designed to protect. We measure these valued interests against the loss, if any, caused to the owner. The balance tips in favor of the worker and the materialmen; we conclude that the safeguards provided by

> California law to protect property owners against unjustified liens are sufficient to comply with due process requirements. We therefore uphold the constitutionality of the mechanics' lien and stop notice laws. 132 Cal. Rptr. at 493, 494; 553 P.2d at 653, 654.

In keeping with the majority and concurring opinions in *Mandel,* we have also examined the jurisdictional statements in the two summary dispositions. In *Spielman-Fond* that statement read as follows:

> The sole question is whether the statutes of the State of Arizona which authorize filing of Mechanics' and Materialmen's Liens against real property conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States, with particular reference to deprivation of a protected interest in property without prior notice and right to be heard.

In *Connolly Development* it states:

> The California Mechanics' Lien Statutes permit an individual who has provided labor or materials incorporated into a work of improvement of real property to obtain a direct lien on said real property by simply recording a claim of lien in the office of the county recorder in the county where the property is located. The statutes provide for no prior judicial hearing on the lien's validity or other prior judicial scrutiny thereof, nor do the statutes provide for a prompt post-lien hearing.
>
> The California Stop Notice (Private Work) statutes permit an individual who has provided labor or materials to a real property improvement to garnish unexpended construction loan funds held by a real property owner's lender for the owner's benefit, with no prior judicial hearing on the validity of the garnishment, or other prior judicial scrutiny, or prompt post-notice hearing.
>
> The question is presented whether the foregoing lien and garnishment procedures, or either of them, violate the procedural due process requirements of the United States Constitution.

III.

Since the due process aspects of these three mechanics' lien statutes are identical, the issues in this case are encompassed in the jurisdictional statements of the two cases summarily disposed of by the Supreme Court. We are bound by those dispositions and must uphold the constitutionality of the Michigan Mechanics' Lien Act.

An appropriate order may be submitted.

(s) George Edwards
Circuit Judge

Date: December 20, 1977

(s) John Feikens
District Judge

Date: December 20, 1977

(s) James P. Churchill
District Judge

Date: December 20, 1977

Judgment of United States District Court

Judgment is hereby entered in favor of defendants and against plaintiff. The awarding of costs and/or attorney's fees, if any, to defendants, to be determined at a later hearing.

(s) John Feikens

Approved as to Form Only:

(s) Daniel G. Wyllie
Attorney for Clow Corporation.

Dated: February 17, 1978

Judgment of United States District Court

Judgment is hereby entered in favor of defendants and against plaintiff. The awarding of costs and/or attorney's fees, if any, to defendants, to be determined at a later hearing.

(s) John Feikens

Approved as to Form Only:

(s) Peter A. Nathan
Attorney for National Lumber
and Rocwall Company

Dated: February 14, 1978

Judgment of United States District Court

Judgment is hereby entered in favor of defendants and against plaintiff. The awarding of costs and/or attorney's fees, if any, to defendants, to be determined at a later hearing.

(s) John Feikens

Approved as to Form Only:

(s) Stanley Weingarden
Attorney for C. Dash Plumbing
& Heating, Inc.

Dated: February 14, 1978

Judgment of United States District Court

Judgment is hereby entered in favor of defendants and against plaintiff. The awarding of costs and/or attorney's fees, if any, to defendants, to be determined at a later hearing.

(s) John Feikens

Approved as to Form Only:

(s) Ray W. McPeters
Director of Civil Counsels Office
of Macomb County

Dated: February 14, 1978

Judgment of United States District Court

Judgment is hereby entered in favor of defendants and against plaintiff. The awarding of costs and/or attorney's fees, if any, to defendants, to be determined at a later hearing.

(s) John Feikens

Approved as to Form Only:

(s) Philip J. Anderson
Attorney for James H. Clark
& Sons, Inc.

Dated: February 14, 1978

Judgment of United States District Court

Judgment is hereby entered in favor of defendants and against plaintiff. The awarding of costs and/or attorney's fees, if any, to defendants, to be determined at a later hearing.

(s) John Feikens

Approved as to Form Only:

(s) Robert N. Smiley
Attorney for Robert T. Barrett
d/b/a Quality Drywall

Dated: February 14, 1978

Judgment of United States District Court

Judgment is hereby entered in favor of defendants and against plaintiff. The awarding of costs and/or attorney's fees, if any, to defendants, to be determined at a later hearing.

(s) John Feikens

Approved as to Form Only:

(s) Stanley W. Kurzman
For Mark J. Glazer, Attorney for
D. G. Kurzman & Sons and Del
Mar Division Champion
International Corporation

Dated: February 14, 1978

Opinion of United States District Court, Dated 4-10-78

In its opinion of December 20, 1977, this court upheld the constitutionality of the Michigan Mechanic's Lien Act on the basis of the United States Supreme Court's summary affirmance in *Spielman-Fond* v. *Hansons, Inc.*, 379 F. Supp. 997 (D.C. Ariz. 1972), *affirmed per curiam* 417 U.S. 901 (1974), and the dismissal of *Connolly Development, Inc.* v. *Superior Court*, 17 Cal. 3d 803, 533 P.2d 637 (1976), *appeal dismissed for want of a substantial federal question*, 429 U.S. 1056 (1977). Plaintiff now asks this court to reconsider its decision claiming (1) that we overlooked the "liberal construction" and "substantial compliance" provisions found in Section 27 of the Michigan Mechanic's Lien Act (M.C.L.A. 570.27); (2) that as con-

strued and applied by the Michigan courts these provisions distinguish the Michigan Act from the Arizona and California schemes considered by the United States Supreme Court; and (3) that as applied, using the liberal construction/substantial compliance doctrine, the Act is unconstitutional.

We decline to reconsider our decision because each of plaintiff's claims is without merit. First, even though plaintiff did not call our attention to the provisions it now raises when its filed its complaint, submitted its extensive briefs, or during oral arguments, these provisions were nevertheless considered in the review of the Michigan Act.

Secondly, the construction and application of the liberal construction and substantial compliance provisions of the Act by the Michigan courts do not serve to distinguish it from the Arizona and California schemes considered by the Supreme Court in *Spielman-Fond* and *Connolly Development*. Arizona courts have held that their state's scheme is remedial and is to be liberally construed. Arizona case-law holds that substantial compliance with the statutes involved is sufficient. *Leeson* v. *Bartol*, 55 Ariz. 160, 99 P.2d 485 (1940). These holdings have been repeated in *Kerr-McGee* v. *McCray*, 89 Ariz. 307, 361 P.2d 734 (1961); *Ranch House Supply* v. *Van Slyke*, 91 Ariz. 177, 370 P.2d 661 (1962); *Peterman-Donnelly Engineers* v. *First National Bank of Arizona*, 2 Ariz. App. 21, 408 P.2d 841 (1966); *Hayward Lumber* v. *Graham*, 104 Ariz. 103, 449 P.2d 31 (1968); *Price* v. *Sunmaster*, 27 Ariz. App. 771, 558 P.2d 966 (1976).

The California courts have reached similar conclusions. *See, Hammond Lumber Co.* v. *Barth Investment Corp.*, 202 Cal. 606, 262 P. 29 (1927); *Henrickson* v. *Bertelson*, 1 Cal. 2d 430, 35 P.2d 318 (1934); *Nolte* v. *Smith*, 189 Cal. App. 2d 140, 11 Cal. Rep. 261, 87 A.L.R. 2d 996 (1961). The California Supreme Court in *Connolly Development* said:

> . . . the courts have uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen.

553 P.2d 637 at 653.

Finally, the fact that a statute may be liberally construed and that it may require only substantial compliance with its provisions does not render it vague or overbroad. This was pointed out by the United States Supreme Court when it considered the federal equivalent of these mechanics' lien acts, the Miller Act, 40 U.S.C. 270a-e. The Court said:

> The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects.

MacEvoy v. *United States ex rel. Tomkins Co.*, 322 U.S. 102, 107 (1943).

As recently as 1974, the Supreme Court quoted this language with approval. *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 124 (1974); *see also, United Bonding Ins. Co.* v. *Catalytic Construction*, 533 F.2d 469 (9th Cir. 1976).

Those claiming rights under the bond provisions of the Miller Act must meet notice requirements analogous to the notice requirements of the mechanics' lien acts. Section 270b of the Miller Act requires that the notice include certain things "with substantial accuracy." These standards of liberal construction and substantial compliance have been enacted by Congress and applied by the Supreme Court. The existence of such standards in Section 27 of

the Michigan Mechanic's Lien Act and their application by Michigan courts do not render the Act unconstitutional.

The motion for reconsideration is denied.

An appropriate order may be submitted.

(s) George Edwards
Circuit Judge

Date: April 10, 1978

(s) John Feikens
District Judge

Date: April 10, 1978

(s) James P. Churchill
District Judge

Date: April 10, 1978

Order Denying Motion for Reconsideration

At a session of said Court held in the Federal Building, Detroit, Michigan on April 20, 1978.

PRESENT: The Honorable JOHN FEIKENS,
District Judge

This matter having come before the Court upon Plaintiff's Motion for Reconsideration of this Court's previous opinion of December 20, 1977, declaring the Michigan Mechanic's Lien Act constitutional; after due consideration of the Motion for Reconsideration, the Court being fully advised in the premises and based upon the opinion dated April 10, 1978,

IT IS HEREBY ORDERED that the Motion for Reconsideration is denied.

(s) John Feikens
U.S. District Judge
signed on behalf of
Hon. George Edwards
Circuit Judge
and
Hon. James P. Churchill
U.S. District Judge

Approved as to Form Only:

(s) Paul A. Ward
Attorney for Plaintiff

APPENDIX B

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that Mortgage Growth Investors, a Massachusetts Business Trust, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the judgment of the court entered February 17, 1978 and the final order of the court entered April 19, 1978, denying plaintiff's motion for a rehearing.

This appeal is taken pursuant to 28 USCA 1253.

II. The clerk will please prepare a transcript of the record in this case, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Pleadings.

2. Briefs.
3. Stipulated documents.
4. Oral Arguments, Friday, September 30, 1977.

III. The following questions are presented by this appeal:

A. Was the jurisdictional statement utilized by the United States Supreme Court in the summary affirmance in *Spielman-Fond* v *Hanson's, Inc.*, 379 F Supp 997 (D AZ 1972), aff'd per curiam 417 US 901 (1974) broader than the actual decision of the United States District Court thus making summary affirmance in *Spielman-Fond* v *Hanson's, Inc.* inapplicable as a binding precedent in the case at bar.

B. Did the United States District Court commit error in upholding the constitutionality of the Michigan Mechanic's Lien Act on the basis of the decisions of the United States Supreme Court in *Spielman-Fond* v *Hanson's, Inc.*, 379 F Supp 997 (D AZ 1972), aff'd per curiam 417 US 901 (1974); *Hicks* v *Miranda*, 422 US 332, 95 S Ct 2281, 45 L Ed 2d 223 (1975); and *Mandell* v *Bradley*, ... US ....., 97 S Ct 2238, ... L Ed 2d .....(1977) and by erroneously finding no significant factual differences between the Michigan and Arizona Statutes or superceding doctrinal developments.

Russell, Ward & Hodgkins
Attorneys for Plaintiff

By (s) Paul A. Ward

Business Address:

865 Union Bank Building
Grand Rapids, Michigan 49503
Telephone: (616) 774-8422

Dated: June 7, 1978

APPENDIX C

Mechanics' Liens

P.A.1891, No. 179, Eff. Oct. 2

AN ACT to establish, protect, and enforce by lien the rights of mechanics and other persons furnishing labor or materials for the building, altering, improving, repairing, erecting or ornamenting of buildings, machinery, wharves, swimming pools, and all other structures, and the building and repairing of sidewalks, and wells, or furnishing stock or renting or leasing contractor's equipment, and to repeal all acts contravening the provisions of this act. As amended P.A.1903, No. 17, Imd. Eff. March 26, P.A.1919, No. 140, Eff. Aug. 14; P.A.1941, No. 266, Eff. Jan. 10, 1942; P.A.1963, No. 104, Eff. Sept. 6; P.A.1965, No. 372, Eff. March 31, 1966.

The People of the State of Michigan enact:

570.1 *Mechanic's lien for labor and material; extent; notice to owner, form*

Sec. 1. Every person who shall, in pursuance of any contract, express or implied, written or unwritten, existing between himself as contractor, and the owner, part owner or lessee of any interest in real estate, build, alter, improve, repair, erect, ornament or put in, survey or plat any lot or parcel of land, or portion thereof, or engineer or design any sewers, water lines, roads, streets, highways, sidewalks, or prepare and furnish pursuant to such contract to such owner, part owner or lessee of any interest in real estate any survey, plat, plat of survey or design engineering plan, or plans, for the improvement of any lot or par-

cel of land not exceeding one-quarter section of land, or who shall furnish any labor or materials in or for building, altering, improving, repairing, erecting, ornamenting or putting in any house, swimming pool, building, machinery, wharf or structure, or who shall excavate, or build in whole, or in part, any foundation, cellar or basement for any such house, swimming pool, building, structure or wharf, or shall build or repair any sidewalks, sewers, sewage disposal equipment, water lines and pumping equipment or wells or shall furnish any materials therefor, or shall furnish any nursery stock, or labor in connection therewith for any property, or shall rent or lease equipment in connection therewith for any property, and every person who shall be subcontractor, laborer, or material man, perform any labor or furnish materials or shall rent or lease equipment to such original or principal contractor, or any subcontractor, in carrying forward or completing any such contract, shall have a lien therefor upon such house, swimming pool, building, machinery, wharf, walk or walks, wells, sewers, sewage disposal equipment, water lines and pumping equipment, foundation, cellar or basement, and other structures, and its appurtenances, or upon such nursery stock, and also upon the entire interest of such owner, part owner or lessee in and to the lot or piece of land, not exceeding one-quarter section of land, or if in any incorporated city or village, not exceeding the lot or lots upon or around or in front of which such improvement is made, to the extent of the right, title and interest of such owner, part owner or lessee at the time work was commenced, equipment leased or materials were begun to be furnished by the contractor under the original contract, or by the subcontractor who furnishes or is furnished with any labor or material or leased equipment in the performance or execution of such subcontract and also the extent of any subsequent acquired interest of any such owner, part owner or lessee, and in

case of the construction of a number of buildings, swimming pools, foundations, cellars, basements, wells, sewers, sewage disposal equipment, water lines and pumping equipment or walks or the furnishing of such nursery stock or labor or leased equipment in connection therewith under 1 contract upon, around or in front of the same lot or contiguous lots for the same owner, part owner or lessee, of any interest in the real estate upon which said buildings are situated or upon, around, or in front of which said well, walk or walks are built or repaired, or nursery stock planted, such lien for such material or labor or leased equipment so furnished, shall attach to all of said buildings, swimming pools, foundations, cellars, basements, wells, sewers, sewage disposal equipment, water lines and pumping equipment, walk or walks, or nursery stock, together with the land upon, around or in front of which the same are being constructed, the same as hereinbefore provided in case of a single building, swimming pool, foundation, cellar, basement, well, sewer, sewage disposal equipment, water line and pumping equipment, walk or improvement or the furnishing or planting of nursery stock: Provided, That any person, firm or corporation furnishing materials or performing labor of any kind entering into the construction of any such building, swimming pool, structure, foundation, cellar, basement, well, sewer, sewage disposal equipment, water line and pumping equipment or walk, or furnishing or planting of nursery stock or who shall survey or plat any lot or parcel of land, or portion thereof, or engineer or design any sewers, water lines, roads, streets, highways, sidewalks, or prepare and furnish pursuant to such contract to such owner, part owner or lessee of any interest in real estate, any survey, plat, plat of survey or design or engineering plan, or plans, for the improvement of any lot or parcel of land not exceeding one-quarter section of land, or who shall rent, lease or

supply contractor's equipment shall within 90 days after furnishing the first of such material or performing the first of such labor or engineering or surveying services, or renting or leasing equipment for any contractor or subcontractor, serve on the owner, part owner or lessee of the premises, or his agent, if such owner, part owner or lessee has a known agent in charge of such structure, swimming pool, improvement, foundations, cellars, basements, wells, sewers, sewage disposal equipment, water lines and pumping equipment, walk or walks, personally or by mailing by certified mail, return receipt demanded, to the last known address of such owner, part owner or lessee, or his agent in charge of said premises, as aforesaid, a written notice, which notice shall be such as will inform the owner part owner or lessee of the premises, or his agent, of the nature of the materials being furnished, or labor being performed, or to be performed, and a description of the premises where furnished, which notice shall notify such owner, part owner or lessee of said premises that such person, firm or corporation furnishing materials or performing labor will claim a lien upon such premises for any amounts unpaid for such materials so furnished or labor performed, or equipment leased, also such part or portion of section 4 of this act[1] as will clearly notify such owner, part owner, or lessee of said premises, that he has a right to demand a statement under oath from such contractor or subcontractor prior to payment of any money on such contract. If neither of such persons can be found for service within the county where the premises are situated, or written notice has not been received, then the notice shall be served by posting in some conspicuous place on the premises within 5 days after the same might have been personally served, if the agent or principal had been found. Such notice shall be in substantially the following form:

To ....., Take notice that the undersigned is furnishing ..... to ..... certain labor or materials for building, excavating, or altering, improving, repairing, erecting or ornamenting, surveying, or designing engineering plans or surveys for the installation of swimming pools, sewers, water lines, roads, streets, highways or sidewalks, or is renting or leasing equipment as the case may be, a certain ....., situated on or around or in front (or the improving by furnishing nursery stock or labor in connection therewith) of the following described property: ..... You are further notified that the undersigned ..... will claim a lien upon the foregoing described premises, and any and all additions, alterations and improvements thereto for any amounts now and hereafter owing and unpaid to the undersigned for the performance of such labor, or for the furnishing of such materials, or both. You are further notified that you may at any time retain from any moneys due or to become due to the original contractor, an amount sufficient to pay all demands owing or unpaid to any subcontractor, material man or laborer, who files this notice with you. The original contractor shall, whenever any payment of money shall become due from you, or whenever he desires to draw any money from you on such contract make out and give to you or your agent a statement under oath of the number and names of every subcontractor or laborer in his employ, and of every person furnishing materials, giving the amount, if anything, which is due or to become due to them, or any of them, for work done or materials furnished, and you may retain out of any money then due, or to become due to the contractor, an amount sufficient to pay all demands that are due or to become due to such subcontractors, laborers and material men, as shown by the contractor's statement, and pay the same to them according to their respective rights, and all payments so

made shall, as between you and such contractor be considered the same as if paid to such original contractor.

Notice as to labor; owner's payment to contractor, effect. Such notice, solely as to labor, however, shall be sufficient if served at any time subsequent to said 90 days, but before the original contractor shall make out and give to the owner, part owner or lessee or his agent, a statement under oath of the number and names of every subcontractor or laborer in his employ, and of every person, firm or corporation furnishing materials, giving the amount, if anything, which is due or to become due on them or any of them, for work done or materials furnished as required by section 4 of this act. The owner, part owner or lessee shall not be liable to the subcontractor, material men or laborers, for any greater amount than he contracted to pay the original contractor, and shall be entitled to recoup any damages which he may sustain by reason of any failure or omission in the performance of such contract, but the risk of all payments made to the original contractor after he shall have received the notice above mentioned shall be upon the owner, part owner or lessee until the expiration of 90 days, within which claims for lien may be recorded as hereinafter provided, and no payment made to any contractor before the expiration of said 90 days shall defeat any lien of any subcontractor, material man or laborer, unless such payment has been distributed among the subcontractors, material men or laborers, or if distributed in part only, then to the extent of such distribution. No person shall have a right to claim a lien as in this act provided, unless and until he shall have served a notice as in this section provided, and proof of the service of such notice shall be attached to the verified statement or account when recorded with the register of deeds as provided in section 5 of this act.[2]

Definitions. The term "nursery stock" as used in this act shall include trees, shrubs, vines, plants, ornamental shrubbery or other nursery stock, goods and supplies. The term "equipment" shall include pumps, heaters, concrete mixers, compressors, graders, cranes, scaffolding and all other types of contractor's equipment, tools and machinery. The term "improvement" or the plural thereof as used in this act, shall include the improvement, beautification or embellishment of property by the furnishing of nursery stock or the performance of labor in connection therewith or the planting thereof, or the furnishing by any registered land surveyor of any survey, plat, plat of survey of any lot or parcel of land, or the furnishing by any registered professional engineer of any engineering design or plans for the installation of any swimming pools, sewers, water lines, roads, streets, highways, sidewalks, or prepare and furnish pursuant to such contract to such owner, part owner or lessee of any interest in real estate and other designs or engineering plans for the improvement of any lot or parcel of land not exceeding one-quarter section of land, or the renting or leasing of any contractor's equipment for excavating, ditching, earth removal, landscaping, leveling, grading or changing the contour of any land, or the repairing, maintaining, restoring, constructing or demolition of any structure or the laying of any drains, sewers or pipelines. As amended P.A.1954, No. 50 § 1, Eff. Aug. 13; P.A.1958, No. 213, § 1, Eff. Sept. 13; P.A.1960, No. 75, § 1, Eff. Aug. 17; P.A.1963, No. 104, § 1, Eff. Sept. 6; P.A. 1965, No. 372, § 1, Eff. March 31, 1966.

[1] Section 570.4.

[2] Section 570.5.

* * *

570.2 *Same; on property of husband and wife or homestead*

Sec. 2. In case the title to such lands upon which improvements are made is held by husband and wife jointly, or in case the lands upon which such improvements are made are held and occupied as a homestead, the lien given by this act shall attach to such lands and improvements if the improvements be made in pursuance of a contract in writing signed by both the husband and wife.

* * *

570.3 *Lien where contracting party has no title; lienor's right to perform contract of purchase*

Sec. 3. Any person furnishing services or materials or renting or leasing contractor's equipment for the erection of a new building, swimming pool, or structure upon land to which the person contracting for such erection has no legal title, or furnishing nursery stock for planting upon such land or labor in connection therewith, shall have a lien therefor upon such buildings (building), swimming pool, or structure; and the forfeiture or surrender of any title or claim of title held by such contracting person to such land shall not defeat the lien upon such building, swimming pool, or structure of such person furnishing services or materials as aforesaid. In case the property covered by the lien is held by the vendee in a land contract, and he surrenders or forfeits his rights thereunder, the person or persons holding such liens may be subrogated to the rights of such vendee, as his rights existed immediately before such surrender or forfeiture, by performing the covenants contained in such contract within 30 days after such forfeiture or surrender is made. As amended P.A.1963, No. 104, § 1, Eff. Sept. 6; P.A.1965, No. 372, § 1, Eff. March 31, 1966.

* * *

570.4 *Owner; retention of money to pay demands; statement of contractor; protection of owner*

Sec. 4. The owner, part owner, or lessee may at any time retain from any moneys due or to become due to the original contractor, an amount sufficient to pay all demands owing or unpaid to any subcontractor, material-man or laborer, who has recorded and served the notice in manner and form as provided in section 1 of this act.[1] The original contractor shall, whenever any payment of money shall become due from the owner, part owner, or lessee, or whenever he desires to draw any money from the owner, part owner or lessee on such contract, make out and give to the owner, part owner, or lessee, or his agent, a statement under oath of the number and names of every subcontractor or laborer in his employ, and of every person furnishing materials, giving the amount, if anything, which is due or to become due to them, or any of them, for work done or materials furnished, and the owner, part owner, or lessee, or his agent, may retain out of any money then due or to become due to the contractor, an amount sufficient to pay all demands that are due or to become due to such subcontractors, laborers, and material men, as shown by the contractor's statement, and pay the same to them according to their respective rights, and all payments so made shall, as between such owner, part owner, or lessee, and such contractor, be considered the same as if paid to such original contractor. Until the statement provided for in this section is made, in manner and form as herein provided, the contractor shall have no right of action or lien against the owner, part owner, or lessee on account of such contract, and any payments made by the owner, part owner, or lessee, before such statement is made, or without retaining sufficient money, if that amount be due or is to become due, to pay the subcontractors, laborers or material men, as shown by the statement, shall be consid-

ered illegal and made in violation of the rights of the persons intended to be benefited by this act, and the rights of such subcontractors, laborers and material men to a lien shall not be affected thereby. If neither such owner, part owner, lessee, nor his agent can be found within the county, then it shall not be necessary for the contractor to make and deliver such statement as a prerequisite to the institution of proceedings under this act, or other suit or proceeding. In order that the owner, part owner, or lessee may be protected, he may at any time during the progress of the work demand in writing of the contractor, the statement herein provided for, which shall be made by the contractor and given to the owner, part owner, or lessee, or his agent, and if such contractor fail to furnish such statement within 5 days after demand made, he shall be liable to such owner, part owner, or lessee, each time he so refuses or neglects to comply with such demand, in the sum of $100.00, and also for all actual damages occasioned by such neglect or refusal, to be recovered in an action on the case or in any other appropriate proceeding. As amended P.A.1958, No. 213, § 1, Eff. Sept. 13.

[1] Section 570.1.

* * *

570.4a *False statement by contractor to obtain money, penalty*

Sec. 4a. Any original contractor or subcontractor who, with intent to defraud, gives or causes to be given to any owner, part owner or lessee, when he desires to draw money, a statement as required by section 4 of this act,[1] which is in fact false, is guilty of a misdemeanor if the statement involved is for $100.00 or less and a felony if it is for more than $100.00. P.A.1891, No. 179, § 4a, added by P.A.1964, No. 100, § 1, Eff. Aug. 28, 1964.

[1] Section 570.4.

570.5 *Statement of lien; form, verification*

Sec. 5. Every person, or his agent or attorney, whether contractor, subcontractor, material man or laborer, who wishes to avail himself of the provisions of this statute, shall make and record in the office of the register of deeds, in the county or counties in which said real estate, house, swimming pool, building, structure or improvement to be charged with the lien is situated, a just and true statement or account of the demand due him, over and above all legal setoffs, setting forth the time when such materials were furnished or labor performed, and for whom, and containing a correct description of the property to be charged with the lien, and the name of the owner, part owner or lessee, if known, which statement shall be verified by affidavit. Such verified statement or account shall be recorded within 90 days from the date on which the last of the materials shall have been furnished or the last of the labor or the last of the designing, engineering or surveying services shall have been performed or the last day of use of any rented or leased equipment by the person claiming the lien, which statement may be in the following form:

State of Michigan

ss.

County of .....

A B, of ....., being duly sworn, says, that he furnished certain labor (or materials or engineering or surveying services) or leased equipment in and for building (or altering, improving, repairing, erecting or ornamenting, as the case may be) a certain ..... situated on the land hereinafter described, in pursuance of a certain contract of which C D, is the owner (or part owner or lessee, contractor, subcontractor or other person, as the case may be). The performance of such labor (or the furnishing of such materials, or engineering or surveying

services) or the use of leased equipment was begun on the ..... day of ..... 19 ....., and the last of such labor was performed (or such materials furnished, or engineering or surveying services) or the use of leased equipment on the ..... day of ..... 19.....; and there is justly and truly due deponent therefor from the said C D, over and above all legal setoffs, the sum of ..... dollars, for which amount deponent claims a lien on said land (or building or swimming pool) of which ..... is the owner (or part owner, or lessee) which premises are described as follows:

.....

.....

.....

A. ..... B. .....

Owner's name .....

Residence No. .....(Street or avenue)

City, township or village .....

Subscribed and sworn to before me this ..... day of ..... 19 .....

Recording, effect, fee. The register of deeds shall indorse upon every statement or account, the date of its recording, and shall record the same in full in the records of his office and properly index the same, and such recording shall have the same effect as to notice as against subsequent purchasers or incumbrancers as the recording of a mortgage. The register of deeds shall receive for recording such lien and all subsequent papers affecting such lien the same fee as is provided by law for the recording of real estate mortgages. As amended P.A.1958, No. 213, § 1, Eff. Sept. 13; P.A.1960, No. 75, § 1, Eff. Aug. 17; P.A.1963, No. 104, § 1, Eff. Sept. 6; P.A.1965, No. 372, § 1, Eff. March 31, 1966.

* * *

570.6 *Same; service of copy on owner, posting, proof*

Sec. 6. Every person recording such statement or account as provided in the preceding section, except those persons contracting or dealing directly with the owner, part owner or lessee of such premises, shall within 10 days after the recording thereof, serve on the owner, part owner or lessee of such premises, if he can be found within the county or in case of his absence from the county, on his agent having charge of such premises, within the county wherein the property is situated, a copy of such statement or claim; but if neither of such persons can be found within the county where such premises are situated, then such copy shall be served by posting in some conspicuous place on said premises within 5 days after the same might have been served personally, could the principal or agent, as aforesaid, have been found. Proof of such service and the date and manner thereof shall be made by the affidavit of such person serving or posting the same, which proof of such service shall be recorded in the office of the register of deeds for such county before any subsequent proceedings shall be taken for the enforcement of such lien. As amended P.A.1958, No. 213, § 1, Eff. Sept. 13.

* * *

570.7 *Discharge of lien by filing of bond; notice to lien holders; objections to sureties*

Sec. 7. The lien of any contractor, sub-contractor, material man or laborer may, at any time, be vacated and discharged, if the owner, part owner or lessee or contractor, shall give to each of such persons whose liens are to be discharged, and file with the clerk of the circuit court for the county in which such property is situated, a good and sufficient bond in the penal sum of twice the amount for which the lien is claimed, with 2 or more sureties to be

approved by the said clerk, conditioned for the payment of any sum for which the obligee in such bond may obtain judgment or decree upon the demand for which such statement of account was filed, which sureties shall justify their responsibility before such clerk or a circuit court commissioner, under oath, and shall severally testify that they are each worth in real estate in the county in which such property is situated, over and above all exemptions, incumbrances, debts and other liabilities, the penal sum of said bond, each of which justifications shall be endorsed in full on said bond; the said clerk on receiving such bond shall within 10 days thereafter serve a notice upon all persons claiming a lien upon said premises of the fact of the filing of such bond, stating the amount thereof and the names of the sureties thereon. The said lien-holders or claimants shall have 10 days after the service upon them of the said notice within which to file objections to the sureties on said bond, and in case any such objections to the sufficiency of such sureties is filed with the said clerk within the 10 days as aforesaid, the said clerk shall not approve the said bond until after the said sureties shall have appeared before him and answered under oath such questions as may be put to them by or on behalf of lien-holder or claimant touching their financial responsibility. If no objections to the sufficiency of the sureties upon such bond shall have been filed within the said 10 days, or if, after the examination of the sureties under oath as herein provided, the said county clerk shall approve said bonds, the said clerk shall at once give to the obligee named therein a certificate that a good and sufficient bond has been filed with him as required by law and shall state the names of the obligor and obligee, the amount of the bond and description of the property covered by the lien thereby discharged. Upon the recording of said certificate in the office of said register of deeds, the lien of the obligee therein named, if of record, shall

thereby be discharged. As amended P.A.1958, No. 213, § 1, Eff. Sept. 13.

* * *

570.8 *Claimant to furnish statement of work and materials; owner to exhibit contract; effect of failure*

Sec. 8. Each person claiming a lien as aforesaid, shall, from time to time, whenever required by such owner, part owner, or lessee, or his agent, and within 5 days from demand thereof, furnish such person demanding the same, a written statement of the amount of work and materials furnished to date of statement, and then unpaid, as nearly as can be ascertained, under penalty of a forfeiture of his lien. Such owner, part owner, or lessee shall, within 5 days after demand of any person claiming lien as aforesaid, produce the contract existing between himself and the contractors, if in writing, and freely permit such lien claimant to make a copy thereof, and shall also, within 5 days after demand thereof, furnish such lien claimant a written statement of the amount due and unpaid on such contract. If such owner, part owner, or lessee shall neglect or refuse to allow any lien claimant to make a copy of said contract, or shall neglect or refuse to make such written statement of the amount due and unpaid thereon as aforesaid, he shall be liable to such lien claimant, his representatives or assigns, each time he so refuses or neglects to comply with such demand, in the sum of 100 dollars, and also for all actual damages occasioned by such neglect or refusal, to be recovered in an action on the case, or to be awarded by a court of equity upon a bill filed to compel the production of such contract, or a disclosure of the amount due and unpaid thereon.

* * *

570.9 *Lien; duration; priority over other interests*

Sec. 9. The several liens herein provided for shall continue for 1 year after such statement or account is recorded in the office of the register of deeds, and no longer unless proceedings are begun to enforce the same as hereinafter provided, and such liens shall take priority as follows:

First, As between persons claiming liens under this statute, the several liens upon the same property attaching by reason of work, labor or materials furnished in carrying forward or completing the same building or buildings, machinery, structure or improvement, shall be deemed simultaneous mortgages.

Second, They shall take priority to all garnishments for the contract debt made prior or subsequent to the commencement of the furnishing of the materials or performance of the labor without regard to the date of recording the claims for lien.

Third, They shall be preferred to all other titles, liens or incumbrances which may attach to or upon such building, machinery, structure or improvement, or to or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of said building or buildings, structure or improvement.

Fourth, The liens for such labor or materials furnished, including those for additions, repairs and betterments, shall attach to the buildings, machinery, erection, structure, or improvement for which they are furnished or done, subject to any prior recorded title, claim, lien, incumbrance, or mortgage to or upon the land upon which such building or buildings, machinery, erection, structure or improvement belongs or is put. Any person holding a lien for such labor or materials furnished upon any premises subject to

any prior recorded lien, incumbrance or mortgage may pay off any such prior lien, incumbrance or mortgage, and shall thereupon be subrogated to all the rights of the prior holder of such lien, incumbrance or mortgage. As amended P.A.1958, No. 213, § 1, Eff. Sept. 13.

* * *

570.10 *Proceedings to enforce lien; lis pendens, parties, cross bills, amendments, further notice*

Sec. 10. Proceedings to enforce such lien shall be by bill in chancery, under oath, and notice of lis pendens recorded in the office of the register of deeds, shall have the effect to continue such lien pending such proceedings. And in such proceedings, the complainant shall make all persons having rights in said property affected or to be affected by such liens so recorded in the office of the register of deeds, and all persons holding like liens so recorded, and those having recorded notice of intention to claim a lien, parties to such action. And all persons holding like liens or having recorded notice of intention to claim a lien, or any other persons having rights in said property, may make themselves parties thereto on motion to the court and notice to complainant, and may file their intervening or cross bills or answers claiming the benefit of cross bills and notices of lis pendens therein. And whenever the principal contractor or any sub-contractor shall have given to the owner, or other person or persons having rights in said property, any bond or surety or guaranty of any kind to protect such owner or other person or persons having rights in said property, against the liens provided for by this act, then the complainant or the owner or other person or persons having rights in said property, may make the surety or sureties in such bond or guaranty, parties to such action by such original bill or by cross bills or answers claiming the benefit of a cross bill, and the court shall

thereupon settle and determine the rights and liabilities of all the parties in the matter, and make such decree as may be required to determine and enforce the rights and liabilities of the various parties including such surety or sureties. Intervening or cross bills shall be on oath, and all bills sworn to shall be evidence of the matters therein charged, unless denied by answer under oath. Amendments may be made to any bill or cross bill at any time before final order, and if it shall appear that any party has had insufficient notice of any such proceedings, such further notice shall be given as the court shall think just. As amended P.A.1958, No. 213, § 1, Eff. Sept. 13.

* * *

570.11 *Same; submission of questions to jury; issues*

Sec. 11. Every material question of fact may be submitted to a jury in the discretion of the court, as in ordinary chancery cases; and such trial shall be had upon a question stated or upon an issue formed under the direction of the court, or otherwise, as the court shall order.

* * *

570.12 *Same; court to determine amounts due; attorney's fee*

Sec. 12. The court shall examine all claims that shall be presented, and shall ascertain and determine the amount due to each creditor who has a lien of the kind before mentioned upon the estate in question, and every such claim that is due absolutely and without any conditions, although not then payable, shall be allowed, with a rebate of interest to the time when it would become payable. The court may, in its discretion, allow a reasonable attorney's fee when judgment shall be rendered in such proceeding, in favor of the parties succeeding therein.

* * *

570.13 *Part performance of contract, compensation*

Sec. 13. When the owner, part owner, or lessee shall have failed to perform his part of the contract, and by reason thereof, the other party shall, without his default, have been prevented from completely performing his part, he shall be entitled to a reasonable compensation for as much thereof as he has performed, in proportion to the price stipulated for the whole, and the court shall adjust his claim accordingly.

* * *

570.14 *Sale of property under court order; receiver; personal decree*

Sec. 14. Upon final decree the court may order a sale of the buildings or machinery separate, or the lands, buildings, machinery, structure, or improvements, together, by a circuit court commissioner or receiver, or may order the property into the hands of a receiver, to be leased or rented from time to time, under the direction of the court, until the liens shall be discharged, or make such other order or disposition of the premises as justice may require. If upon the coming in and confirmation of the final report, any portion of the liens shall still be unpaid, the court may enter personal decree for the same against the party who may be personally liable therefor, and execution shall issue for the same as upon other personal decrees rendered by the court.

* * *

570.15 *Same; part of premises*

Sec. 15. If any part of the premises can be separated from the residue and sold without damage to the whole, and if the value thereof shall be sufficient to satisfy all the claims proved in the case, the court may order a sale of

that part, if it shall appear to be most for the interest of all the parties concerned.

* * *

570.16 *Same; disposition of proceeds in case claims are all ascertained*

Sec. 16. If the claims against the estate are all ascertained at the time of ordering the sale, the court may at the same time order the officer to pay over and distribute the proceeds of the sale, after deducting all lawful charges and expenses, to and among the several creditors to the amount of their respective claims, if there is sufficient therefor; and if there is not sufficient, then to divide and distribute the same among the creditors in proportion to the amount due to each of them: Provided, however, That such original contractor shall be subrogated to the rights of his subcontractors, material-men, and laborers, who shall first be paid in full; and that the subcontractor shall be subrogated to the rights of their material-men and laborers, who shall first be paid in full.

* * *

570.17 *Same; disposition of proceeds in case claims are not all ascertained*

Sec. 17. If the claims shall not have been ascertained when the sale if ordered, or if for any other reason it shall be deemed proper to postpone the order of distribution, the court may direct the officer to bring the proceeds of sale into court to be disposed of according to the order of such court; and if in consequence of the claims of attaching creditors, or for other cause, the whole cannot be properly distributed at once, the court may make 2 or more successive orders of distribution as the circumstances may require.

* * *

570.18 *Same; disposition of surplus*

Sec. 18. If there be any surplus of the proceeds of the sale, after making all the payments before mentioned, it shall forthwith be paid over to the owner, part owner, lessee, or other person entitled thereto; but such surplus shall be liable to be attached or taken in execution in like manner as if it proceeded from a sale made under execution.

* * *

570.19 *Same; manner, redemption*

Sec. 19. Sales under such decrees shall be made in the same manner as in ordinary cases of mortgage foreclosure, unless otherwise directed by the court; and all lands sold under such order or decree of the court may be redeemed at any time within 15 months from the time of filing such bill for such foreclosure.

* * *

570.20 *Several claimants, equal shares*

Sec. 20. When there are several attaching creditors, they shall, as between themselves, be entitled to be paid according to the order of their respective attachments, but when several creditors, who are entitled to the lien provided for in this act, have equal rights as between themselves, and the fund shall be insufficient to pay the whole, they shall share it equally in proportion to their respective claims.

* * *

570.21 *Costs*

Sec. 21. The costs in all cases shall be subject to the discretion of the court, and shall be paid out of the proceeds of the sale, or by any parties to the suit, as justice and equity may require.

* * *

570.22 *Lien not to bar action on contract*

Sec. 22. Except as herein otherwise expressly provided, nothing in this act contained shall be construed to prevent any creditor in any such contract from maintaining an action thereon at common law in like manner as if he had no lien for the security of his debt.

* * *

570.23 *Lien holder to execute discharge upon payment of debt*

Sec. 23. When the debt secured by such lien is fully paid, the lien holder shall execute to such owner, part owner, or lessee, or other person having an interest or title in the lands, buildings [building], machinery, structure, or improvements affected by such lien, a discharge as in case of a discharge of a mortgage, or shall indorse such discharge on such claim of lien filed, and upon refusal to do so on demand, shall be subject to like penalties as are provided by law for refusal to discharge mortgages which have been fully paid.

* * *

570.24 *Death of lien claimant*

Sec. 24. If any lien claimant shall die before the commencement of a suit thereon, or the taking of proceedings to enforce the same, the suit or proceeding may be commenced and prosecuted by his executors or administrators, or if commenced in his lifetime, may be prosecuted by them, as it might have been by the deceased himself if living.

* * *

570.25 *Assignment or waiver*

Sec. 25. All liens or claims for liens which may arise or accrue under the terms of this act shall be assignable,

and proceedings to enforce such liens may be maintained by and in the name of the assignees, who shall have as full and ample power to enforce the same as if such proceedings were taken under the provisions of this act by and in the name of the lien claimant [claimants] themselves. No lien provided for in this act shall be defeated or waived by the taking by the lien claimant, from any person, or any security for such debt, other than upon the real estate itself, in the absence of express agreement that the taking of such security shall be a waiver of the lien.

* * *

570.26 *Enforcement of claims not due*

Sec. 26. Parties entitled to liens under this act whose claims are not due and payable, may give notice of their intent to claim a lien, and may become parties to any suit to enforce a lien, or institute such suit or proceedings themselves, and their claims shall be allowed, subject to a reduction of interest, if such claims are not due at the time of the rendition of decree, but no process shall issue or proceedings be had to enforce a decree for such claims until the same mature.

* * *

570.27 *Construction of statute; amendments to process or pleadings; practice; appeal*

Sec. 27. This act is hereby declared to be a remedial statute and to be construed liberally to secure the beneficial results, intents and purposes thereof; and a substantial compliance with its several provisions shall be sufficient for the validity of the lien or liens hereinbefore provided for, and to give jurisdiction to the courts to enforce the same. Amendments to any process, pleadings or proceedings in such actions to enforce the liens given by this act, either in form or substance, shall be allowed at any

time before final decree is rendered, on application of either party upon such terms and conditions as justice may require; and the security for costs may be required as in other chancery cases. The practice in all suits brought to enforce liens under the provisions of this act shall be the same as in ordinary chancery cases and the court shall have the same power and jurisdiction over the subject matter and parties to the suit as in other chancery cases, except as herein otherwise expressly provided. And in any case where a decree or final order shall be made by any circuit court in chancery, or the judge thereof, under the provisions of this act, either party who may consider himself aggrieved by such order or decree may appeal therefrom to the supreme court, in the same manner as is provided by law for appeal in ordinary chancery cases; and the powers, duties and jurisdiction of the supreme court in relation to such appeal shall be the same as are provided by law in relation to appeals in ordinary chancery cases.

* * *

570.28 *Notice of proceedings by publication*

Sec. 28. When any defendant resides out of the state, or is absent from the state, or concealed therein, or cannot be found by reason of his continued absence from his place of residence, the complainant may cause notice to be given by publication in like manner, and upon the same conditions as in ordinary suits in chancery.

* * *

570.29 *Definitions*

Sec. 29. For the purpose of this act the words "owner, part owner or lessee" shall be construed to include all the interest, either legal or equitable, which such person may have in the real estate upon which the improvements con-

templated by this act are made, including the interest held by any person under contracts of purchase, whether in writing or otherwise. The word "material-man" as used in this act, shall be construed to include all persons by whom any materials are furnished in or for building, altering, improving, repairing, erecting or ornamenting, or putting in any house, swimming pool, building, machinery, wharf or other structure or walk or walks or by whom nursery stock is furnished for the improvement of any property or by whom equipment is rented or leased for the improvement of any property. The word "laborer" shall be construed to include any mechanic, workman, artisan or laborer, employed in or about any such work as hereinbefore specified. The word "improvements" shall be construed to include sidewalks as hereinbefore specified. As amended P.A.1963, No. 104, § 1, Eff. Sept. 6; P.A.1965, No. 372, § 1, Eff. March 31, 1966.

* * *

570.30 *Application of act to existing contracts*

Sec. 30. This act shall not be construed to apply to any contract made or entered into at any time before this act shall take effect.

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-199

MORTGAGE GROWTH INVESTORS,
a Massachusetts business trust,
Appellant,

vs.

CLOW CORPORATION, a Delaware corporation, et al.,
Appellees.

MOTION TO AFFIRM JUDGMENT, AND BRIEF IN SUPPORT THEREOF

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vs.

CLOW CORPORATION, a Delaware
corporation, et al.,
Appellees.

MOTION BY APPELLEES, NATIONAL LUMBER CO. AND ROCWALL CO., TO AFFIRM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Appellees National Lumber Co. and Rocwall Co. move this Court to affirm the judgment sought to be reviewed on appeal by Appellant, Mortgage Growth Investors, on the following grounds:

A. The questions presented for review by Appellant have already been decided by this Court, on their merits, in favor of Appellees.

B. It is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

BRIEF IN SUPPORT OF MOTION

I

Appellant has appealed from a judgment of a three-judge District Court upholding the constitutionality of the Michigan Mechanic's Lien Act in reliance upon this Court's summary affirmance of a District Court judgment in *Spielman-Fond v. Hanson's, Inc.*, 417 US 901 (1974), and upon this Court's summary dismissal of an appeal from a California Supreme Court in *Connolly Development, Inc. v Superior Court*, 429 US 1056 (1977).

Appellant's attack on the statute was directed at the provisions of MCL 570.5, which require a person claiming a mechanic's lien to record a notice thereof with the local register of deeds in order to give notice to the world of his claim to a lien. Appellant asserted below that the ministerial act of the county register of deeds in accepting, filing and recording such notice was State action depriving Appellant of its property without due process of law.

The identical claim was made before a three-judge District Court in *Spielman-Fond v. Hanson's, Inc.*, 397 F Supp 997 (D. Ariz., 1972), and the Court held as follows:

> ". . . the filing of a mechanics' and materialmen's lien lien does not amount to a taking of a significant property interest, and that, accordingly, ARS §33-081 et seq. are not violative of due process of law under the Fourteenth Amendment . . ." 379 F Supp. 997 at 999.

The judgment entered by the District Court, in favor of the lien claimant, was appealed to this Court. The question presented in the Jurisdictional Statement was as follows:

> "The sole question is whether the statutes of the State of Arizona which authorize filing of Mechanics' and Materialmen's Lien against real property conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States, with particular reference to deprivation of a protected interest in property without prior notice and right to be heard."

The judgment of the three-judge Court was summarily affirmed by this Court without opinion. *Spielman-Fond v. Hanson's, Inc.*, 417 US 901 (1974).

As is the case here, the Arizona appellant's attack was directed solely at the provision of Arizona law permitting or requiring the filing of a notice of the lien in order to perfect it, an act which the Arizona District Court held "does not amount to a taking of a significant property interest."

In short, the issue raised in the Arizona court was identical to the issue in this case, the Arizona District Court decided the issue in favor of the lien claimant, the appeal to this Court presented only that issue for determination, and this Court affirmed the judgment of the Arizona District Court.

In *Connolly Development, Inc. v. Superior Court, supra*, this Court dismissed, for want of a substantial federal question, an appeal from the Supreme Court of California, which upheld the constitutionality of the California Mechanic's Lien Act.

Under the decisions of this Court in *Hicks v. Miranda*, 422 US 332 (1975) and *McCarthy v. Philadelphia Civil Service Commission*, 424 US 645 (1975), a summary dismissal of an appeal from a State Court decision for want of a substantial federal question is a decision on the merits and must be followed by lower courts. The rule is the same for summary affirmances on appeals from three-judge District Courts.

To be sure, in *Mandel v. Bradley*, 432 US 173 (1977), this Court remanded the case for the lower court to consider on the merits because the lower court had erroneously relied on a summary affirmance by this Court in *Tucker v. Salera*, 424 US 959 (1976), a case involving two issues, only one of which was present in *Mandel*. However, in *Mandel*, this Court reaffirmed its holding in *Hicks*:

"Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." 432 US 173 at 176.

In the present case, the opinion of the District Court discussed *Hicks v Miranda, supra*, and *Mandel v. Bradley, supra*, examined the Mechanic's Lien Acts of Arizona, California and Michigan, examined the Jurisdictional Statements in *Spielman-Fond* and *Connolly Development* and compared the issues presented in them with the issues in this case. After doing this, the three-judge District Court said:

"On the basis of these careful comparisons we conclude that the issues raised in this case were presented to the United States Supreme Court and were found by it to be without substance. Therefore, we are bound to uphold the constitutionality of the Michigan Mechanics' Lien Act." (Appellant's Jurisdictional Statement, P. 11-12).

"Since the due process aspects of these three mechanics' lien statutes are identical, the issues in this case are encompassed in the jurisdictional statements of the two cases summarily disposed of by the Supreme Court. We are bound by those dispositions and must uphold the constitutionality of the Michigan Mechanics' Lien Act." (Appellant's Jurisdictional Statement, P. 15).

We submit that the reasoning and opinion and judgment of the Court below are in accord with the prior opinions of this Court and we move that judgment be affirmed.[1]

II

Not only has the issue presented by Appellants already been decided by this Court in favor of Appellees, the issue itself has no substance. The United States, and the 50 States, each have many statutes providing for the creation and enforcement of consensual and nonconsensual liens, encumbrances, mortgages, security interests, and the like. This Court previously upheld the constitutionality of state mechanic's lien statutes in *Hartford Accident Co. v. Nelson Co.*, 291 US 352 (1934), and has never questioned the constitutionality of the Miller Act, 40 USC §270a-e, granting similar rights to persons furnishing labor and materials for the construction of federal public works.

Appellant does not assert the unconstitutionality of Section 1 of the Michigan Act (MCL 570.1) which creates a lien on real estate in favor of any person furnishing labor or materials for the construction of improvements thereon. Nor does Appellant attack the constitutionality of those provisions of the Michigan Act (MCL 570.10 et seq.) which require the holder of a lien, in order to foreclose it, to commence a plenary action before a

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[1] Appellant herein also argues that the Arizona statute and the Michigan statute differ in the remedies available after the filing of the notice of lien (Jurisdictional Statement, P.7). The argument is specious: the availability or non-availability of post-filing remedies is not a factor in determining whether there was a taking in the first place. In *Fuentes v. Shevin*, 407 US 67 (1972), this Court said, "The Fourteenth Amendment draws no bright lines around three day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." (407 US 67 at 86). The holding of the Arizona Court, affirmed by this Court, was that the filing of the lien did not amount to a significant taking in the first place.

court of general jurisdiction and serve summons and complaint upon the defendants, and which require a full evidentiary trial as to the validity of the lien and the amount claimed—before the lien claimant obtains a judicial order directing foreclosure of his lien by sale. The procedural provisions of the Michigan statutes clearly grant full due process protection to a property owner before he is deprived of title, possession, enjoyment or use of his property.

The recent decisions of this Court relating to the enforcement of liens, from *Sniadach v. Family Finance Corp. of Bay View*, 395 US 337 (1969), through *Flagg Brothers, Inc. v. Brooks*, _____US_____, 46 LW 4438 (5/15/78), have dealt solely with the method of enforcing a consensual lien or statutory lien by the seizure, sequestration, or sale of property belonging to the debtor. The issue before this Court in *Sniadach* was not whether a State could constitutionally permit a creditor to garnishee wages. The issue was whether the State could permit the sequestration of the wages before judgment, without affording the debtor an opportunity to be heard. The issue before this Court in the recent *Flagg Brothers* case was not whether a State could constitutionally grant a warehouseman a lien upon property stored with him—it was whether the statute could constitutionally permit the warehouseman to sell the stored property without court proceedings. In the case now before this Court, the Appellant argues that it has a constitutionally protected right to a hearing in order to determine the amount and validity of a claim before a person furnishing labor and materials can record a notice of his statutorily created lien. This assertion is completely without merit and is not based on any decision of this Court.

Precisely the same argument could be made in almost every instance where a recording of notice is required in order to perfect a lien. For example:

a) Notices of tax liens are filed by federal and state officials without any prior judicial determination of the amount owing.

b) In many commercial transactions, a real estate mortgage is

executed contemplating future advances in which the face amount of the mortgage greatly exceeds the amount actually advanced at that time by the mortgagee. A mortgagee may make a $10,000 advance and record a mortgage reciting that it secures a debt of $100,000. Clearly, the mortgagor is not entitled to any judicial hearing as to the amount of his debt prior to the recording of the mortgage.

c) Section 9-402 of the Uniform Commercial Code permits a financing statement to be filed with State or local officials before there is any indebtedness, and even before there has been an agreement to give security. Again, no judicial hearing is required prior to such filing.

Although a mechanic's lien holder may file a claim of lien in which he asserts more money owing than is actually owing, it is equally true that a mortgagee can record a mortgage which recites a greater debt than is actually owing. As is well known to every person who makes monthly mortgage payments, the face amount of the recorded mortgage does not establish the indebtedness at any time. The mere fact that there may be an instrument on record reciting a debt greater than that actually owed does not mean that the debtor has been deprived of any interest in his property. The filing or recording of a claim to mechanic's lien has "the same effect as to notice against subsequent purchasers or encumbrances as the recording of a mortgage." MCL 570.5. It is not the recording of the statement which creates the lien; it was created the instant labor or materials were furnished in the construction of the improvements.

The Michigan Act does not permit non-judicial foreclosure of the lien. It does not permit the lien claimant to take possession of the property or to sell it, until he has started a suit, served the defendant, won a trial, and obtained a judicial order of foreclosure. The owner of the property affected by the lien is granted every possible procedural safeguard before he is deprived of any interest in his property.

The mere filing of a notice of mechanic's lien does not de-

prive an owner of any property. It does not prevent him from continuing to enjoy the property, to use it, to occupy it, and to collect rents from the building constructed with the labor and materials of unpaid lien claimants. It does not prevent him from selling the property subject to the liens, nor does it prevent him from selling the property and paying the unpaid lien claimants.

The only thing an owner cannot do with his land after the recording of a notice of lien is sell it free and clear of the liens. To permit him to do so would serve no useful social purpose and in a sense would deprive Appellees and others similarly situated of their property without due process of law.

Respectfully submitted,

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